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No. 82-950

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALICE MADELEINE LABORDE,
Petitioner,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, The Regents of the University of California (hereafter "University"), respectfully requests denial of the Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case, reported at 686 F.2d 715-719.

REASONS WHY WRIT SHOULD BE DENIED

1. The First Question Presented by Petitioner Fails to Apply Well Settled Standards As to the Defendant's Burden in Rebutting a Prima Facie Case in a Title VII Action

Petitioner Laborde argues that the Court of Appeals is in error when it holds that the University has rebutted Laborde's prima facie case. In support of this, Laborde

claims that there is no evidence in the record that the Chancellor's decision denying Laborde's promotion to full professor was based on legitimate, nondiscriminatory reasons.

The defendant's burden in rebutting an employee's prima facie case alleging job discrimination under Title VII of the Civil Rights Act of 1964 is clearly stated in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254-256 (1981):

> "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. *The defendant need not persuade the court that it was actually motivated by the proffered reasons.* See Sweeney, supra, at 25, 58 L.Ed.2d 216, 99 S.Ct. 295. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." (450 U.S. at 254, emphasis ours.)

And, quoting *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1978),

> "'the employer's burden is satisfied if he simply "explains what he has done" or "produc[es] evidence of legitimate nondiscriminatory reasons."'" (450 U.S. at 256.)
>
> "We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." (450 U.S. at 257.)

Contrary to Laborde's assertion, evidence was presented supporting the reason for nonpromotion. At trial the legitimate, nondiscriminatory reason for the failure to promote Professor Laborde was asserted by the University: that at the outcome of the University's multilevel review process, including a variety of internal safeguards, a decision was made by the Chancellor that she lacked the excellence in research and scholarship required for promotion to the rank of full professor. Furthermore, the summaries of evaluations by peers who reviewed Professor Laborde's scholarship were placed into evidence by her. The summaries reflected the consideration which formed the basis for the ultimate decision not to promote. Thus, the trier of fact had before it the lawful reason for the action from which the court could rationally conclude that the employment decision had not been motivated by discriminatory animus, but also summaries of the underlying peer evaluations of petitioner's scholarship.

The University met its burden in rebutting Laborde's prima facie case. The court below properly so held.

2. Petitioner's Second Question Misstates the Burden the Trial Court and Ninth Circuit Applied to Petitioner's Proof of Pretext

In the statement of the second question, Laborde asserts a conflict between a Fifth Circuit decision (*Jepsen v. Florida Board of Regents*, 610 F.2d 1379 (5th Cir. 1980)) holding that a Title VII plaintiff can prove "pretext" by a preponderance of the evidence and the Ninth Circuit's holding as to plaintiff's burden in the instant case. Laborde claims that the decision of the Ninth Circuit requires that

a Title VII plaintiff must prove that an employer-stated reason for an action is "unreasonable." Laborde's claim is without merit.

This Court has settled the question of the burden of proof a Title VII plaintiff must carry in proving pretext in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As reaffirmed in *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253:

> "[S]hould the defendant carry this burden [articulating lawful reasons for the action], the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."

The Court of Appeals properly applied this standard. Laborde's support for the idea that the Court of Appeals applied a standard of "unreasonableness" is Finding of Fact X. There the trial court stated that it could not say that the determination of the adequacy of Professor Laborde's scholarship was "unreasonable." Laborde attempts to infer an incorrect application of the burden of proof from the mere use of the word "unreasonable."

A reading of the whole of Finding X indicates that the use of the word "unreasonable" imposed no greater burden of proof on Laborde:

> "While two of the requirements for promotion to full professorship were met by Professor Laborde—University service and teaching ability—it was the collective academic judgment of the University that plaintiff lacked the third requirement for promotion—excellence in research and scholarship. I cannot say that the University's determination that Professor Laborde's scholarship as inadequate was unreasonable.

> [Footnote omitted.] This Court is reluctant to substitute its judgment for the academic experts in the field, no matter how impressive her scholarly work appears to the Court. *The crucial inquiry for the Court is and has been whether the decision not to promote the plaintiff was made without the influence of sex or national origin discrimination. I am unable to find any evidence that plaintiff's gender or national origin influenced the decision not to promote plaintiff to the rank of full professor.*" (Emphasis ours.)

The court, in Finding X, correctly states what the judicial inquiry ought to be and carefully separates that inquiry from judgments of academic quality. Laborde has blurred the inquiry as to academic quality and the inquiry as to whether the decision not to promote was discriminatory. Nowhere in Finding of Fact X is there a suggestion that the burden is other than preponderance of the evidence.

Should there be any doubt as to the burden applied by the trial court it would be quickly dispelled upon review of the Conclusions of Law. Conclusion No. 5 correctly states what a plaintiff must show in order to prevail in a Title VII action: that she is qualified for the position she seeks and that regardless of her qualifications, she was rejected on the basis of sex or national origin. The trial court goes on to state that "'[t]he ultimate burden of persuasion on the issue of discrimination remains with the plaintiff, who must convince the court by a preponderance of the evidence that he or she has been the victim of discrimination.'" (Citing *Sweeney v. Board of Trustees of Keene State College,* 569 F.2d 169, 177 (1st Cir. 1978).)

In Conclusion No. 7, the trial court states that the plaintiff contends that the reasons for nonpromotion were mere pretext for discrimination:

> "The Court concludes, however, that the University's refusal to promote Professor Laborde to Full Professor was based on legitimate reasons and not because of her sex or national origin. Plaintiff has failed to convince the Court *by a preponderance of the evidence* that she was a victim of illegal discrimination. Plaintiff simply failed to prove she was qualified for promotion." (Emphasis ours.)

The legitimate reasons for nonpromotion are set forth in Conclusion No. 6:

> "There was substantial evidence that Professor Laborde's scholarship was not of the quality expected of a Full Professor at Irvine University. The individuals comprising the committees for rank promotion were in the most advantageous position to assess plaintiff's scholarly qualifications."

The Findings of Fact also reflect the underlying factual basis for the decision: Summaries from peer evaluations provided a mixed picture of plaintiff's scholarship (Finding XI); the collective academic judgment of the University that plaintiff lacked the third requirement [excellence in scholarship] for promotion (Finding X); and that "excellence in scholarship is a significant rational criterion in connection with the decision to promote" (Finding XI).

The trial court applied the preponderance of the evidence standard and the Ninth Circuit correctly upheld it.

3. The Third Question Concerning Judicial "Deference" to the University's Stated Nondiscriminatory Reason For Its Action Is Settled Contrary to Petitioner

Laborde argues that the trial court's "deference" to the University's stated reason for the action taken is clearly erroneous. She relies on *Jepsen v. Florida Board of Regents,* 610 F.2d 1379, 1383 footnote 2 (5th Cir. 1980). *Jepsen* is not inconsistent with the Ninth Circuit's decision below and Laborde mischaracterizes the trial court's consideration of deference.

Laborde's argument is based on a portion of Conclusion of Law No. 6 (Petition, Appendix E, pages 29-30). If one looks to the whole of Conclusion No. 6, the "deference" given by the trial court clearly is not erroneous. Conclusion No. 6 begins by concluding that Laborde established a prima facie case by means of statistical evidence. This is followed by the conclusion that the University met its burden in articulating legitimate, nondiscriminatory reasons for not promoting plaintiff: "There was substantial evidence that [petitioner's] scholarship was not of the quality expected of a Full Professor at Irvine University." The conclusion then observes that faculty committees are in the best position "to assess plaintiff's scholarly qualifications."

It is with regard to the *assessment of scholarly qualifications* that the court gives *"cautioned* deference," not as to the ultimate issue of whether the action of nonpromotion was discriminatory. The trial court found the University's stated reason for nonpromotion to be a legitimate reason for the action, and that plaintiff failed to convince the court that these reasons were pretext.

Laborde incorrectly argues that *Jepsen v. Florida Board of Regents*, 610 F.2d 1379 (5th Cir. 1980) would produce a different result. *Jepsen* is not in conflict. It merely notes that the courts do not impose upon a Title VII plaintiff a more stringent burden of proof just because the employer is a university and the employee a professor. *Jepsen* reversed a court requirement that the plaintiff prove that the action of university officials was "a clear abuse of discretion." The courts below in the instant case did not impose such a burden. Nowhere in the findings and conclusions is there a suggestion that any standard other than "preponderance of the evidence" was imposed on the plaintiff. (See discussion with regard to burden in (2) above.) Footnote 2 of *Jepsen* cited by Laborde does not prohibit deference. Rather, it states its agreement with the Second Circuit opinion in *Powell v. Syracuse University*, 580 F.2d 1150 (2d Cir. 1978), *cert. denied*, 439 U.S. 984 (1978), which stated in dicta that the nonintervention doctrine of *Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974), "had been pressed beyond all reasonable limits." (610 F.2d at 1383 footnote 2.) *Powell* states the court's task to be "to steer a careful course between *excessive* intervention in the affairs of the university and *the unwarranted tolerance of unlawful behavior.*" (580 F.2d at 1154, emphasis ours.)

The courts below in *Laborde* steered this careful course between excessive intervention and unwarranted tolerance. A court presses deference beyond reasonable limits when it places an undue burden on plaintiff to prove pretext. This is not the case where a court gives cautioned deference to the academic judgment of faculty peers as to the adequacy of scholarship as a legitimate articulated reason

sufficient to rebut a prima facie case.[1] Plaintiff had the burden to show this judgment to be a pretext either by "persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (*Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981).) Laborde simply failed to meet this burden.

4. The Trial Court's Refusal to Provide Laborde Access to Confidential Academic Personnel Records Was Not An Abuse of Discretion Under the Facts Stated in Petition

It is uncontested that Laborde moved for an order to inspect confidential peer evaluations the day the case was originally set for trial. When the motion was heard at the time of trial, Laborde refused the court's offer of an *in camera* inspection. Issues such as timeliness are committed to the sound discretion of the District Court. (*Croley v. Matson Navigation Co.,* 434 F.2d 73 (5th Cir. 1970).) The Ninth Circuit correctly upheld the trial court's denial of Laborde's motion on the basis of its being untimely. (Petition, Appendix B, page 14.)

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[1]The Second Circuit in *Powell* upheld the trial court's findings which, as in the instant case, included findings about the adequacy of plaintiff's performance as judged by faculty colleagues. It concluded that decisions were reached honestly, and because plaintiff failed to demonstrate that the reasons were pretextual, the university was to prevail.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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